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April 8, 2009

U.S. Department of Commerce  
National Telecommunications and Information Administration  
1401 Constitution Avenue, NW  
Washington, D.C. 20230

U.S. Department of Agriculture  
Rural Utilities Service  
1400 Independence Avenue, SW  
Washington, D.C. 20250-1599

**Re: Joint Request for Comments on Implementing the American Recovery and Reinvestment Act of 2009: New Jersey Division of Rate Counsel Recommendations. Docket No. 090309298-9299-01**

Dear Sir or Madam:

In response to the Request for Information ("RFI") released on March 12, 2009<sup>1</sup> by the National Telecommunications and Information Administration, U.S. Department of Commerce, ("NTIA") and the Rural Utilities Service, U.S. Department of Agriculture, ("RUS"), the New Jersey Division of Rate Counsel ("Rate Counsel")<sup>2</sup> submits its initial comments to support and contribute to the implementation of the Broadband initiatives set forth in the American Recovery and Reinvestment Act of 2009 ("Recovery Act"). The Recovery Act authorizes NTIA to establish the Broadband Technology Opportunities

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<sup>1</sup> / See *Federal Register*/ Vol. 74, No 47 published March 12, 2009 at 10716-10721 by NTIA and RUS asking for comments on the RFI.

<sup>2</sup> / Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to Rate Counsel's continued participation and interest in implementation of the Telecommunications Act of 1996 ("Act" or "1996 Act"). Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

Program (“BTOP”) and the RUS to make grants and loans for the deployment and construction of broadband systems.

In these comments, Rate Counsel submits recommendations on how NTIA and RUS should define “unserved area” and “underserved area” and recommendations on streamlining the application process and including recommended provisions in such applications to ensure projects are completed timely with designated milestones met.

It is clear that broadband is a crucial driver of economic recovery and global competitiveness. The broadband funding programs established by Congress in the ARRA can help foster these goals. In particular, these programs can help bring broadband to the nation’s homes with no physical access to broadband and overcome other barriers to adoption – such as affordability, the lack of a computer or other equipment needed to connect to the Internet, and low levels of basic “digital literacy.”

Broadband is an engine of job creation, a facilitator of educational and healthcare opportunities, and a means of ensuring that all Americans have access to the Internet. To meet the goal of ARRA to facilitate universal access to broadband and create jobs and economic stimulus, the first step is to define “unserved” and “underserved areas” so as to provide access to broadband to consumers residing in unserved areas, and to improve access to consumers residing in underserved areas. The ARRA offers the means to have broadband facilities built in unserved areas and to expand broadband facilities and improve access in underserved areas.

#### **Definitions for “unserved” and “underserved” areas**

Rate Counsel urges that NTIA and RUS define an “unserved” area as any area where 70 percent of the households do not have access to cable Internet services. By way of example, if cable Internet service is available to 75% of households in a municipality, the municipality would not be an “unserved area.” A municipality, where cable Internet service is available to 70% or less of households, would be defined as an “unserved area.” An “underserved” area should be defined as any area other than an “unserved” area where Internet subscription, based upon the total Internet subscribers served by wireline and cable, even though available, is at or below 70%. Internet subscription should not include dial-up service or satellite (hereinafter referred to the “70/70” Test).

The 70/70 test proposed by Rate Counsel is consistent with the 1996 Telecommunications Act which establishes a similar test authorizing the Federal Communications Commission (“Commission”) to adopt rules to ensure diversity for cable consumers.<sup>3</sup> In addition, Rate Counsel’s 70/70 test will further Section 706 of the 1996 Act that calls upon the Commission and states to promote advanced telecommunications capabilities, broadband, to all Americans including primary and secondary schools.<sup>4</sup>

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<sup>3</sup>/ See 47 U.S.C. § 532(g) which establishes a 70/70 test which if satisfied permits the Federal Communications Commission to adopt rules to ensure diversity of information resources.

<sup>4</sup> / See 47 U.S.C. §157 nt.

The proposed definitions would enable NTIA and RUS to identify and target ARRA funds so that broadband facilities are deployed (1) to households in “unserved” areas that lack access now to broadband facilities, and (2) to “underserved” areas where households in urban and rural areas that may have access to broadband facilities but do not currently subscribe to the service for reasons other than a lack of access (e.g. low income customers and seniors).

In New Jersey, there are many communities, both urban and non-urban, where subscription to the Internet is low even though more than 70% of the households have access to cable Internet facilities.<sup>5</sup> For example, in Newark New Jersey, the subscription to cable is 42% even though broadband facilities are available from wireline and cable providers. Reasons other than physical access are clearly preventing Newark residents from gaining access to broadband. Thus, Newark is an underserved area where consumers need improved access to which ARRA funding should be targeted.

The adoption of Rate Counsel’s “70/70” Test by NTIA would enable “unserved” areas to be identified so that the RUS can target and allocate 75% of RUS funds to rural areas without sufficient access to highspeed broadband and 25% of the RUS fund to underserved non rural areas. Rate Counsel’s 70/70 Test would enable NTIA to identify “unserved” and “underserved” areas and target its ARRA funds appropriately. Such funding could be used to address other issues that undermine the ability of consumers to purchase or access broadband even where it is available. This framework promotes the Congressional objective to expand the development of broadband throughout the country. The framework is also easy to administer and can be applied based upon information that is currently available, without having to wait until the broadband mapping initiatives contemplated by the Recovery Act are completed.

#### **NTIA and RUS should adopt a streamlined application process with a standardized form**

In order to simplify the process and ensure maximum transparency, Rate Counsel recommends the agencies develop a single application form/template by which entities may apply for federal assistance for broadband-related projects under either the rural broadband program(s) administered by the RUS or the BTO Program administered by the NTIA.<sup>6</sup>

Accordingly, Rate Counsel recommends that:

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<sup>5/</sup> The systems that are above or below the average are identified in New Jersey Board of Public Utilities, Office of Cable Television, Cable Fact Report for 2005. There are 39 cable television systems serving 562 municipalities out of 566 municipalities. More detailed information can be obtained from the Office of Cable Television.

<sup>6/</sup> The recommendations that follow are based upon the applications recommendations developed by National Association of State Consumer Advocates.

The application form should include a section – applicable to *both* programs – that collects basic data regarding any applicant for federal funding under either rural program(s) administered by the RUS or the BTO Program administered by the NTIA. Such information should include:

- The full legal name, address, telephone number and email address of the applicant, together with the full name, address, telephone number and email address of a natural person who is designated to serve as applicant's point of contact for the agencies.
- A description of the project, the number of persons/households to be served by the project, and the project's location with a transmission capability of \_\_\_\_ Mbps (upload) and \_\_\_\_ Mbps (download)."
- A general description of the area and customers to be served by the project, including such information as:

Description of the community/area to be served (*i.e.*, rural or non rural based upon US Census definition).

Statement whether the community/area is currently unserved/underserved, including a brief explanation why the project is needed (*e.g.*, there is a small telephone company serving the community that has failed to deploy broadband; there are customers who are located outside a current provider's service territory who could not be served by established providers; there is no service at all, etc);

Number of customers/households to be served;

information regarding income levels, unemployment, demographics in the community/area to be served.

- A section requiring the applicant to identify the broadband funding program pursuant to which applicant wishes to apply for funding, and an optional check-off for funding under the other agency's program(s), which constitutes a certification that the applicant reasonably believes it could qualify for funding under the other agency's program(s).
- For applications submitted under the rural broadband programs administered by the RUS, the application form should include a separate section that requires the applicant to provide the following:
  - a. The type of funding assistance sought (*i.e.*, grant, loan or loan guarantee) and the amount of funding assistance sought.

- b. Information demonstrating that at least 75% of the area to be served by the project is in a rural area that is without sufficient access to high speed broadband service.
  - c. Information explaining whether the broadband system that is the subject of the application will deliver end users a choice of more than one service provider.
  - d. Information explaining whether the project will serve the highest proportion of rural residents that do not have access to broadband service.
  - e. Information demonstrating that all project elements will be fully funded if approved.
  - f. Information demonstrating that all activities associated with the proposed project can be completed if the requested funds are provided. Included in section should be information demonstrating the scalability of the proposed project, demonstrating that some elements of the project can be completed if less than the amount sought is awarded, including cost estimates for each element of the proposed project.
  - g. Information demonstrating that activities can commence promptly following approval.
- For applications submitted under the broadband programs administered by the NTIA, the application form should require the applicant to provide the following:
    - a. A statement setting forth the total amount of grant sought.
    - b. A statement indicating the activities the grant sought will be used to finance, consistent with § 6001(g)(1) – (6).
    - c. An explanation why the proposed project would satisfy the purposes of the BTO Program (including a check-off list of the purposes set forth in § 6001(b)).
    - d. If an application proposes to deploy broadband infrastructure in an area, a statement explaining how the criteria set forth in § 6001(h)(2)(A) – (D) will be satisfied.
    - e. A detailed explanation meeting the requirements of § 6001(e), including:
      - 1. A showing that the project would not be constructed prior to the end of Fiscal Year 2010 (*i.e.*, September 30, 2010) without funding from the grant program (For example, the applicant has a budget of \$100,000 for the next fiscal year, but has a project that could be implemented over a wider territory with additional funds. The additional funds would result in the entire project being complete within the next two years, rather than being spread out over 5 or 6 years.).

2. A statement demonstrating that the applicant is capable of carrying out the project or function to which the application relates in a competent manner in compliance with all Federal, State and local laws, as required by § 6001(e)(4). Included in this statement should be information regarding the applicant's technical or managerial experience and financial resources.
  3. A statement demonstrating, and certifying, that the applicant will appropriate or otherwise unconditionally obligate from non-Federal sources, funds required to meet the 20% non-Federal matching share of the project's overall estimated cost. Applicants should be allowed to include contributions in kind (*e.g.*, dedication of rights-of-way, provision of donated material or volunteer labor) with a reasonably estimated fair market value equivalent to the 20% match.
  4. Provide a check-off box if the applicant intends to submit a petition for a waiver of this requirement, based on a showing of financial need.
  5. A statement disclosing each source and amount of any other Federal or State funding sources from which the applicant receives, or has applied for, in order to fund activities or projects to which the grant application relates.
  6. A statement acknowledging that, if the grant is awarded, the applicant shall comply with the quarterly reporting requirements adopted by the NTIA pursuant to § 6001(i)(1).
  7. A statement acknowledging that, if the grant is awarded, the applicant shall comply with any additional reporting and information requirements adopted by the NTIA pursuant to § 6001(i)(2).
  8. A statement certifying that the applicant will employ procedures, and describing same, that would allow the NTIA to ensure that the funds are used and accounted for in an appropriate manner.
- A final section applicable to all applications submitted under *both* the rural broadband program(s) administered by the RUS or the BTO Program administered by the NTIA, setting forth the following certifications and assurances:
    - i. A statement whether any other entity's application for broadband funding for the particular community or area is pending review or approval by the RUS/NTIA, or certification that the applicant has exercised due diligence to ascertain whether any

- such applications are pending review or approval and
- ii. certification that no part of the area of a broadband project to be funded under RUS/NTIA program is receiving or will, during the period of the funding assistance under the ARRA, receive funding from the other agency.
  - iii. Certification that the information provided in, attached to, or subsequently submitted in relation to, the application is true and correct, subject to penalty of perjury.
  - iv. Acknowledgement that information provided in conjunction with the application may be included in any publicly accessible database established by the NTIA that contains the information set forth in § 6001(i)(5), or that may be established by the RUS that contains substantially similar information.
  - v. Certification to cooperate, in good faith, with the RUS, the NTIA, the FCC or the State in which the proposed project is located, in any efforts to obtain data to map broadband deployment, subscription, capabilities, price or similar information.

#### **Other Considerations.**

- Each agency, including the FCC, should prominently display a link to a read-writable ARRA-funding application form on their websites and provide a link where completed application forms may be submitted electronically to the relevant agency(ies). If the agencies develop a single form that allows funding applications to programs administered by each agency simultaneously, the agencies should consider developing and providing a link to a joint web page for applications.
- Each funding agency should maintain a publicly-accessible inventory of funding applications that have been submitted or allocated to the agency for funding under the ARRA on its website, arranged by state or territory.
- Finally, the agencies should consider adopting the following additional recommendations for applications seeking broadband funding under either the RUS- or NTIA-administered programs:

Require funding assistance to be conditioned on applicants' agreement to the following broadband pricing commitments, in order to maximize broadband take rates:

Applicants should be required to include a broadband pricing commitment that would apply for an initial period of three years.

Most of the costs of establishing a broadband network are fixed costs, which will be subsidized by the grant program. Thus it would be appropriate for prices for broadband service deployed under the ARRA not to raise by more than the general rate of inflation for a period of at least three years.

Applicants should be required to state the prices they currently charge for broadband service and the prices they would charge for service following receipt of broadband funding under the ARRA. Such pricing information should include any service connection charges and early termination fees.

Applicants should also be required to indicate whether they will offer broadband service on a month-to-month basis, or on a longer-term contract basis.

Agency verification of broadband transmission capabilities and the NTIA and RUS should implement a process to evaluate the data speeds of projects funded under the ARRA. One means of doing so would be to consider the busy-hour engineering plan associated with the deployment, and evaluate whether this is consistent with transmission speeds reported for the project

Establishing criteria for objectively evaluating the relative merits of different broadband applications for the same or overlapping areas.

## **Ensure affordability**

In order to ensure affordability:

NTIA/RUS should establish a national, regional, or even state-specific benchmark prices for broadband services based on the tiered transmission capability identified by the FCC, across all technologies utilized to provide broadband service.

NTIA/RUS should consider a requirement that grant recipients offer a stand-alone broadband service that is priced either no higher than a national average benchmark for the same or substantially similar service in terms of transmission capability and technology, or the lowest-priced offering for the same or substantially similar service of any broadband provider in the state.

NTIA/RUS should address (1) how should “affordability” be defined and how will NTIA know if service is affordable and (2) whether pricing requirements be imposed on grant recipients and, if so, how are such requirements to be determined?



## **Conclusion**

Rate Counsel supports the goal of the American Recovery and Reinvestment Act of 2009 and looks forward to providing additional comments on how best to achieve the goals of the Act including the promotion of affordable broadband to all Americans.

Respectfully submitted,

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